IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 28.

JAMES C. ROGERS,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING
and
SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.

RUSSELL L. DEARMONT,
GEORGE W. HOLMES,
HAROLD L. HARVEY, and
DON S. SKINNER,
2008 Missouri Pacific Building,
St. Louis, 3, Missouri,
Attorneys for Respondent.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

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PETITION FOR REHEARING.

Comes now the Respondent and respectfully moves the Court to order a rehearing of the above cause.

GROUNDS.

1. In holding that a jury question was made by the testimony of Petitioner that the burning of weeds and vegetation was ordinarily done with a flame thrower, the Court

has ignored the evidentiary rule that a verdict must be based on evidence of probative value. Petitioner's own testimony and all of the testimony in the case shows that the work he was performing was not "ordinarily done" with a flame thrower.

2. The Court's opinion abrogates proximate causation in cases arising under the Federal Employers' Liability Act.

The Court's present ruling, that a railroad is liable if its negligence played "even the slightest part" in an employee's injury, should be re-examined by the Court to determine whether such a departure from the long standing fundamental concepts of negligence and proximate cause ignores the statutory requirement that the injury must result from an employer's negligence.

Certificate.

I certify that this Petition is presented in good faith and not for delay.

Don B. Sommers.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.

1. The Court has ruled that a jury question of negligence was raised, and has based its ruling upon Petitioner's testimony on direct examination that the burning off of weeds and vegetation was ordinarily done with a flame throwing machine. We submit that the Court, in so holding, not only has ignored the significance of Respondent's testimony that the use of a flame throwing machine was discontinued because of the dangers attendant thereon (R. 68, 69), but has also ignored Petitioner's own testimony on cross-examination. He said on cross-examination that he knew nothing about the operation of the machine, but had only seen it pass through town long before he went to work on the railroad, and he admitted that it was not in use at the time he worked on the railroad and that it was only used to burn the entire right of way, which was not the work he was performing on the day of the accident (R. 27, 28). In ruling that such testimony raises a submissible issue of negligence the Court seems to hold that a person who merely sees a machine being used on one occasion is qualified to give evidence of probative value on which the Court can base a finding that such a machine was "ordinarily" used for a particular purpose. The effect of the Court's ruling in this respect, and its similar rulings in *Webb v. Illinois Central Railroad Company* and *Ferguson v. Moore-McCormack Lines, Inc.*, decided the same day as this case, is to allow juries to determine proper methods of railroad maintenance without any evidence as to the availability or feasibility, or even the safety, of such methods. We earnestly urge that this issue be reconsidered.

2. Heretofore, this Court has held that the 1939 Amendment to the Federal Employers' Liability Act[1] abolished

[1] 53 Stat. 1404, 45 U. S. C. A. 54.

assumption of risk and contributory negligence as absolute defenses to negligence actions brought under the Act. The foundation of the carrier's liability—negligence—was left intact. The Court to date, has held that the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury remained.[2] Liability was stated to be determined by the general rule, which defines negligence as lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done.[3]

It was also said that for negligence to be actionable it must be the proximate cause of injury. Proximate cause is defined as a direct efficient producing cause from which injury can reasonably be foreseen or expected.[4] It does not mean "sole cause" for there may be more than one producing cause. But it must be a cause without which the injury would not have occurred.

The opinion of the Court in this case completely changes these fundamental concepts and in effect discards the entire theory of proximate cause. The Court now says that if the employer's negligence played *any part, even the slightest,* in producing the injury, there is liability. The Court also says that "it was an irrelevant consideration whether the immediate reason for [Petitioner's] slipping off the culvert was the presence of gravel negligently allowed by the respondent to remain on the surface, or was some cause not identified from the evidence." This language taken literally means that the Court would have sustained lia-

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[2] *Tiller v. Atlantic Coast Line R. Co.,* 318 U. S. 54, 87 L. Ed. 610.

[3] *Ibid.*

[4] *Brady v. Southern R. Co.,* 320 U. S. 476, 64 S. Ct. 232.

bility even if the Petitioner's injury was the result of his having been struck by lightning.

In so holding does not the Court ignore the requirement in the statute that the *injury must result from negligence?*[5] For injury to result from negligence, even in part, it must be produced by negligence; it must be caused by negligence. Negligence which results in injury does not merely play a slight part. We submit that so long as the Act provides recovery only for injury *resulting from* the employer's negligence, the common law concepts of negligence and proximate causation remain unchanged. Liability predicated upon negligence playing the slightest part in the injury, is not justified by placing overemphasis upon the "in whole or in part" portion of the statute.

The Missouri Supreme Court in deciding this case adhered to these long-standing common law concepts of negligence which were undeniably stated to be the law by this Court, until the decision in this case. We submit that the persistence of State Supreme Courts and the Circuit Courts of Appeals in adhering to these common law tests of whether the evidence in a particular case raises a question of negligence (want of due care under the circumstances) and of proximate causation (that which is an immediate efficient producing cause of injury) cannot be summarily dismissed as "narrow and niggardly" constructions. Congress has not seen fit to remove these standards of negligence under the Act.

Since the decision in this case will no doubt affect hundreds of cases arising under the Act, and involve enormous sums of money, we earnestly submit that this decision

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[5] "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable to any person . . . for such injury or death *resulting* in whole or in part *from* the negligence of any of the officers, agents or employees of such carrier . . ." (Emphasis added.) 35 Stat. 65, 45 U. S. C. 51.

abrogating the common law concepts of negligence and proximate cause is worthy of reconsideration and we therefore urge the Court to grant a rehearing.

Respectfully submitted,

RUSSELL L. DEARMONT,
GEORGE W. HOLMES,
HAROLD L. HARVEY, and
DON B. SOMMERS,
2008 Missouri Pacific Building,
St. Louis, Missouri,
Attorneys for Respondent.